

KERAJAAN MALAYSIA

v.

DATO' HAJI GHANI GILONG

FEDERAL COURT, KOTA KINABALU
TAN SRI DATO' ANUAR ZAINAL ABIDIN CJ MALAYA
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' MOHAMED DZAIDIN HJ ABDULLAH FCJ
[CIVIL APPEAL NO. 01-4-93]
3 MAY 1995

REVENUE LAW: *Section 142 Income Tax Act 1967 - Certificate of assessment - Certificate signed by Acting Assistant Director General of Inland Revenue - Whether valid - Whether certificate to be signed by the Director General personally - Sections 142(1) & 136 Income Tax Act 1967 - Section 7 Interpretation Act 1967.*

REVENUE LAW: *Assessment - Appeal pending before Special Commissioners - Claim against taxpayer by writ of summons pending appeal thereof - Whether maintainable - Art. 13(1) Federal Constitution - Section 103(1) Income Tax Act 1967.*

REVENUE LAW: *Assessment to additional income tax levied more than twelve (12) years before writ of summons issued - Whether barred by limitation - Whether High Court or Special Commissioner has jurisdiction to rule on limitation - Section 91(1) & (3) Income Tax Act 1967.*

PRACTICE & PROCEDURE: *Stay of execution - Summary judgment for tax payable - Effect of pending appeal before Special Commissioners - Whether special circumstances justifying a stay demonstrated.*

The respondent was assessed to income tax and increase of income tax levied under s. 103(4)(5) and (5A) Income Tax Act 1967 (the Act) amounting to RM504,052 for the years of assessment 1970, 1971, 1972, 1973, 1982, 1983 and 1984. The certificate under s. 142(1) of the Income Tax Act was signed by the Acting Assistant Director General for and on behalf of the Director General of Inland Revenue certifying the amount of tax due and payable.

The Inland Revenue Department subsequently filed writ of summons and applied for summary judgment under O. 14 RHC 1980 in respect of the assessed and additional tax aforesaid. The respondent resisted the action and raised in his defence these issues namely (i) that the certificate under s. 142(1) (the Act) should have been signed by the Director General personally (ii) that as the appeal against the assessment was pending before the Special Commissioners for Income Tax the writ was premature and contravened Art. 13(1) of the Federal Constitution (iii) that income tax for assessment year 1971, levied only on 4 August 1984, was statute barred as 12 years had elapsed prior to the issue of the writ.

The trial Judge rejected the 1st and 2nd grounds but upheld the 3rd and deducted the sum of RM51,244.16 from the total claim being additional assessment for assessment year 1971. His Lordship stayed execution of the judgment for the balance until determination of the taxpayer's appeal pending before the Special Commissioners. The Inland Revenue Department appealed on the limitation point and stay of execution.

a Held:

Per: Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The general words of s. 136 Income Tax Act read together with s. 7 Interpretation Act 1967 (Consolidated and Revised 1989) are sufficient to permit the Acting Director General to sign and issue the certificate under s. 142(1) for and on behalf of the Director General.

b [2] The plea of limitation based on s. 91(1) and (3) Income Tax Act 1967 by a taxpayer cannot be entertained by the High Court. Only the Special Commissioners have the power to do so. If otherwise, a decision by the High Court on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court thereby abdicating their fact finding function of determining whether there has been fraud or wilful default under s. 91(3)(a) Income Tax Act.

c [3] Alternatively, even if the Special Commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the question of limitation. This would not be reasonable and what is unreasonable cannot be the law.

d [4] Since an appeal by case stated lies from decisions of the Special Commissioners to the High Court, the plea of limitation could arise for determination by the High Court but full appellate powers would not then be exercised as case stated appeals are on point of law on facts found by the Special Commissioners. Thereafter an appeal to the Federal Court would also be subject to the same restriction where full appellate powers cannot be exercised.

e [5] Where summary judgment for taxes due is given with a stay of execution pending an appeal before the Special Commissioners, and a plea of limitation succeeds, then the result of such an appeal before the Special Commissioners must override the order for summary judgment. This is because the Special Commissioners are judges of fact and have the jurisdiction to consider pleas of limitation, excessive tax, incorrect assessment or incorrect increase all of which are issues the Court is prohibited from entertaining under s. 106(3) Income Tax Act 1967. Therefore, the trial Judge's order deducting the sum of RM51,244.16 from the total claim ought to be set aside.

f [6] The trial Judge had the power to grant a stay but since there was no formal application for a stay of execution supported by an affidavit alleging special circumstances, there was no material on which a stay could be granted. Therefore the order, ought to be, and is set aside.

g [Appeal allowed].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG HASIL: Seksyen 142 Akta Cukai Pendapatan 1967 - Sijil taksiran ditandatangani oleh Pemangku Penolong Ketua Pengarah Hasil Dalam Negeri - Samada sah - Samada sijil harus ditandatangani oleh Ketua Pengarah sendiri - Seksyen kecil 142(1) & 136 Akta Cukai Pendapatan 1967 - Seksyen 7 Akta Tafsiran 1967.

UNDANG-UNDANG HASIL: Taksiran - Rayuan menanti penyelesaian di hadapan Pesuruhjaya Khas - Tuntutan terhadap pembayar cukai melalui writ saman sementara menantikan penyelesaian rayuannya - Samada boleh dikekalkan - Perkara 13(1) Perlembagaan Persekutuan - Seksyen 103(l) Akta Cukai Pendapatan 1967.

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UNDANG-UNDANG HASIL: Taksiran kepada cukai pendapatan tambahan - Samada dilevikan lebih daripada tempoh 12 bulan sebelum writ saman dikeluarkan - Samada dihalang oleh had masa - Samada Mahkamah Tinggi mempunyai bidangkuasa untuk memerintah atas had masa atau Pesuruhjaya Khas membuat keputusan - Seksyen 91(l) & (3) Akta Cukai Pendapatan 1967.

a

AMALAN & PROSEDUR: Penggantungan pelaksanaan - Penghakiman terus bagi cukai yang kena dibayar - Kesan menantikan penyelesaian rayuan di hadapan Pesuruhjaya Khas - Samada keadaan khas mewajarkan satu penggantungan ditunjukkan.

b

Responden telah ditaksirkan cukai pendapatan dan kenaikan cukai pendapatan telah dilevikan di bawah s. 103(4)(5) dan (5A) Akta Cukai Pendapatan 1967 yang berjumlah sebanyak RM504,052 bagi tahun-tahun taksiran 1970, 1971, 1972, 1973, 1982, 1983 dan 1984. Sijil di bawah s. 142(l) Akta Cukai Pendapatan telah ditandatangani oleh Pemangku Penolong Ketua Pengarah untuk dan bagi pihak Ketua Pengarah Jabatan Hasil Dalam Negeri mengesahkan jumlah cukai yang masih belum jelas dan kena dibayar.

c

Jabatan Hasil Dalam Negeri berikutan itu telah memfailkan writ saman dan memohon untuk mendapatkan penghakiman terus di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980 berhubung dengan cukai tambahan dan yang ditaksirkan di atas. Responden telah menentang tindakan tersebut dan membangkitkan dalam pembelaannya isu-isu ini, iaitu (i) bahawa sijil tersebut di bawah s. 142(1) seharusnya ditandatangani oleh Ketua Pengarah sendiri (ii) bahawa oleh kerana rayuan terhadap taksiran tersebut sedang menanti penyelesaian di hadapan Pesuruhjaya Khas bagi Cukai Pendapatan writ tersebut adalah pramasa dan melanggar Perkara 13(1) Perlembagaan Persekutuan (iii) bahawa cukai pendapatan bagi tahun taksiran 1971 yang telah dilevikan hanya pada 4 Ogos 1984, telah dihalang oleh statut kerana 12 tahun telah berlalu sebelum pengeluaran writ tersebut.

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e

Hakim perbicaraan telah menolak alasan-alasan pertama dan kedua tetapi membenarkan alasan ketiga dan menolak jumlah sebanyak RM51,244.16 daripada jumlah tuntutan yang merupakan taksiran tambahan untuk taksiran tahun 1971. Yang Arif Tuan Hakim telah menggantung pelaksanaan penghakiman tersebut untuk bakinya sehingga penentuan rayuan pembayar cukai yang sedang menantikan penyelesaian di hadapan Pesuruhjaya-Pesuruhjaya Khas. Jabatan Hasil Dalam Negeri telah merayu atas perkara had masa dan penggantungan pelaksanaan.

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Diputuskan:

Per: Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Perkataan-perkataan am s. 136 Akta Cukai Pendapatan dan s. 7 Akta Tafsiran 1967 (Disatukan dan Terpinda 1989) adalah memadai untuk membenarkan Pemangku Ketua Pengarah untuk menandatangani dan mengeluarkan sijil tersebut di bawah s. 142(l) untuk dan bagi pihak Ketua Pengarah.

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[2] Rayuan had masa berdasarkan s. 91(l) dan (3) Akta Cukai Pendapatan 1967 oleh seorang pembayar cukai tidak boleh dilayan oleh Mahkamah Tinggi. Hanya Pesuruhjaya-Pesuruhjaya Khas mempunyai kuasa untuk melakukan sedemikian. Jika sebaliknya, satu keputusan oleh Mahkamah Tinggi terhadap persoalan had masa akan menghalang Pesuruhjaya-Pesuruhjaya Khas tersebut daripada memutuskan soalan yang sama kerana mereka akan menganggap diri mereka terikat oleh keputusan Mahkamah Tinggi yang dengan itu melucutkan fungsi pencarian fakta mereka bagi menentukan samada telah berlakunya fraud atau keingkaran yang disengajakan di bawah s. 91(3) (a) Akta Cukai Pendapatan.

h

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- a** [3] Secara alternatifnya, sungguhpun Pesuruhjaya-Pesuruhjaya Khas tersebut tidak menganggapkan diri mereka terikat sedemikian rupa, ianya boleh membawa kepada keputusan-keputusan yang tak konsisten oleh Mahkamah Tinggi dan Pesuruhjaya-Pesuruhjaya Khas tersebut atas persoalan had masa. Ini tentunya tidak wajar dan apa yang tidak wajar tidak mungkin merupakan undang-undang.
- b** [4] Oleh kerana sesuatu rayuan oleh kes yang dinyatakan bergantung kepada keputusan-keputusan Pesuruhjaya Khas kepada Mahkamah Tinggi, akuan-akuan had masa akan terbit untuk penentuan oleh Mahkamah Tinggi tetapi kuasa-kuasa rayuan yang sepenuhnya tidak akan ketika itu dilaksanakan kerana rayuan-rayuan kes yang dinyatakan adalah atas perkara undang-undang atas fakta yang didapati oleh Pesuruhjaya Khas tersebut. Selepas itu sesuatu rayuan kepada Mahkamah Persekutuan akan juga tertakluk kepada sekatan yang sama di mana kuasa-kuasa rayuan sepenuhnya tidak boleh dilaksanakan.
- c** [5] Di mana penghakiman terus untuk cukai-cukai yang kena dibayar telah diberikan dengan satu penggantungan pelaksanaan sementara menantikan penyelesaian satu rayuan di hadapan Pesuruhjaya Khas, dan rayuan had masa berjaya diperolehi, maka keputusan rayuan yang sedemikian di hadapan Pesuruhjaya Khas haruslah menolak perintah untuk penghakiman terus. Ini adalah kerana Pesuruhjaya Khas tersebut adalah hakim-hakim fakta dan mempunyai
- d** bidangkuasa untuk menimbangkan rayuan had masa, cukai yang berlebihan, taksiran yang salah atau kenaikan salah yang mana kesemuanya merupakan isu-isu yang mana Mahkamah dilarang melayannya di bawah s. 106(3) Akta Cukai Pendapatan 1967.
- e** [6] Dengan yang demikian, perintah Hakim perbicaraan menolak jumlah sebanyak RM51,244.16 daripada jumlah penuh haruslah diketepikan. Oleh kerana tidak terdapat permohonan yang rasmi untuk penggantungan pelaksanaan yang mendakwa keadaan-keadaan yang khas, tidak terdapat perkara di atas mana sesuatu penggantungan boleh dibenarkan. Perintah penggantungan tersebut, begitu juga, seharusnya dan adalah diketepikan.

[Rayuan dibenarkan].

Cases referred to:

- f** *Arumugam Pillai v. Government of Malaysia* [1975] 2 MLJ 29 (**fol**)
Comptroller-General of Inland Revenue v. N.P. [1973] 1 MLJ 165 (**fol**)
Government of Malaysia v. Ng Song Choon [1975] 1 MLJ 131(**refd**)
Chong Woo Yit v. The Government of Malaysia [1989] 1 MLJ 473 SC (**refd**)
Government of Malaysia v. Gan Chuan Lian @ Gan Phuay Chee [1992] 1 CLJ 679 (**refd**)
Lim Foo Yong Sdn. Bhd. v. Comptroller-General of Inland Revenue [1986] 2 MLJ 161 (**refd**)
Government of Malaysia v. Jasanusa Sdn. Bhd. [1995] 2 CLJ 701 (**dist**)

g **Legislation referred to:**

Federal Constitution, Art. 13(1)
Income Tax Act 1967, ss. 91(1) & (3), 99, 103(1),(4),(5) & (5A), 106(3), 136, 142(1), 145(2)(c), para. 34 Sch. 5
Interpretation Act, 1967 (Consolidated and Revised 1989), s. 7
Rules of the High Court 1980, O. 14

- h** *For the appellant - Abdul Karim bin Abdul Jalil (Osman Ujang, Federal Counsel with him)*
For the respondent - Philip Lee Vui Keong; M/s. Lee & Aziz

i

JUDGMENT

Edgar Joseph Jr. FCJ:

Datuk Haji Ghani Gilong, a businessman ("the taxpayer") and the respondent to this appeal, was assessed to income tax and increase of income tax (inclusive of penalties and interest) levied under sub-sections 4, 5 and 5A to s. 103, of the Income Tax Act, 1967 ("the Act") for various sums, amounting in all, to RM504,052, in respect of the years of assessment 1970, 1971, 1972, 1973, 1982, 1983, 1984, pursuant to notices of assessment, duly sent by ordinary mail, and which were deemed to have been served, having regard to the provisions of s. 145(2)(c) of the Act and were, by s. 103(1) of the Act, payable on service of the same, whether or not he appealed under s. 99 of the Act, against the assessment or composite assessments, as the case might be.

A certificate purporting to have been issued under s. 142(1) of the Act had been signed by the Acting Assistant Director General Puan Norlina bte. Zainal for and on behalf of the Director General of Inland Revenue ("the Director General") giving the name and address of the taxpayer, and was, if valid, by reason of that provision, sufficient evidence of the amount, so due, as aforesaid, and sufficient authority for the Court to give judgment, accordingly.

The revenue having caused to be issued in the name of the Government of the Federation of Malaysia, the writ of summons herein, accompanied by a statement of claim annexed thereto, against the taxpayer, claiming the total amount aforesaid, and the taxpayer having entered appearance thereto, the Revenue had also caused to be issued a summons for summary judgment under O. 14 of the Rules of the High Court, 1980. The taxpayer had affirmed and filed an affidavit in opposition, wherein he had raised three separate defences; namely:

- (1) the purported certificate signed by the Acting Assistant Director General of Inland Revenue, was not a certificate within the meaning of s. 142(1) of the Act, as it was not signed by the Director General personally;
- (2) the claim made in the writ of summons was premature inasmuch as the taxpayer's appeal against the assessments aforesaid was still pending before the Special Commissioners and so barred by reason of Art. 13(1) of the Federal Constitution which provides that "no person shall be deprived of property save in accordance with the law."
- (3) the assessment to additional income tax for the year of assessment 1971 had been levied as long ago as 4 August 1984, which was more than 12 years prior to the date of the issue of the writ of summons and, therefore, the claim relating thereto was barred by limitation under s. 91(1) of the Act, as illustrated by the cases of *Chong Woo Yit v. Government of Malaysia* [1989] 1 MLJ 473, followed in *Government of Malaysia v. Gan Chuan Lian @ Gan Puay Chee* [1992] 1 CLJ 679.

In the event, the Judge in the Court below (Mr. Justice Syed Ahmad Idid), had rejected the first and the second of the above defences but upheld the third, and, in consequence, had made an order deducting the sum of RM51,244.16 claimed by way of additional assessment for the year of assessment 1971, from the total sum claimed, being the amount of RM504,052. He had also granted a stay of execution of the judgment in respect of the balance of the sum claimed until determination of the taxpayer's appeal against the assessments aforesaid by the Special Commissioners. From his decision, in so far as it held that the claim for additional assessment for the year of assessment 1971 was barred by limitation and his order for stay as regards the balance of the sum claimed, the Government of Malaysia has appealed to this Court.

a As for the first of the above defences, in our view, the very general words of s. 136 of the Act, read together with s. 7 of the Interpretation Act, 1967 (Consolidated and Revised 1989), are sufficient to permit an Acting Director General in the position of Puan Norlina bte. Zainal to sign and to issue a certificate under s. 142(1) of the Act for and on behalf of the Director General.

b As for the second of the above defences, the question raised is sufficiently answered for us against the taxpayer by the cases of *Arumugam Pillai v. Government of Malaysia* [1975] 2 MLJ 29 and *Comptroller- General of Inland Revenue v. NP* [1973] 1 MLJ 165 and we need say no more about it.

The Judge was, therefore, right in holding against the taxpayer in so far as the first and the second of the above defences were concerned.

c In our view, however, the Judge was wrong in acceding to the submission based on the limitation point advanced on behalf of the taxpayer and also wrong for granting a stay pending determination of the taxpayer's appeal before the Special Commissioners, for reasons which may be briefly stated.

d As to the limitation point, the Judge had cited the cases of *Government of Malaysia v. Ng Song Choon* [1975] 1 MLJ 131, *Chong Woo Yit v. The Government of Malaysia* [1989] 1 MLJ 473 SC and *Government of Malaysia v. Gan Chuan Lian @ Gan Phuay Chee* [1992] 1 CLJ 679. In particular, he had relied on holding (1) of the headnote to *Chong Woo Yit*, which reads:

e By virtue of the proviso to s. 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the government for the recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s. 91 of the Income Tax Act 1967 not made in any year of assessment or within 12 years after its expiration, the Revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.

Sub-section 1 of s. 91 of the Act provides:

f 91(1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

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But, sub-section 3 of s. 91 of the Act provides, by way of exception to sub-section 1, as follows:

91(3) The Director General where it appears to him that:

h (a) any form of fraud or wilful default has been committed by or on behalf of any person;
or
(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

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In considering the plea of limitation based on sub-sections 1 and 3 of s. 91 of the Act, advanced by Counsel for the taxpayer, we have read, with interest, the following passages in the judgment of Gill CJ when speaking for the Federal Court, in the case of *NTS Arumugam Pillai v. Government of Malaysia* [1976] 2 MLJ 72.

Touching on the argument of Counsel for the appellant in that case, his Lordship said this:

The main contention by Counsel for the appellant in support of these two grounds was that the additional assessments of income tax for the years of assessment 1953 and 1958 were statute barred because they were not made before the expiration of 12 years from the respective years of assessment. For this he relied on s. 91(1) of the Act which reads as below: (His Lordship then reproduced s. 91(1)).

His Lordship next touched on the argument of Counsel for the respondent, as follows.

Counsel for the respondent on the other hand contended that there was wilful default on the part of the appellant in that he failed to disclose part of his income when he submitted his returns for the years of assessment 1953 and 1958, so that s. 91(3) of the Act applied. That section reads as follows: (His Lordship then reproduced s. 91(3)).

His Lordship then continued:

The learned Counsel further contended that this issue, if there was anything in it, should be raised by the appellant before the Special Commissioners for Income Tax to whom an appeal has in fact been lodged.

His Lordship then concluded:

The view which we took was that there was no substance in what Counsel for the appellant contended and that what Counsel for the respondent said in reply had substantial merit in it. In our judgment limitation as such does not apply to any proceedings by the Government for the recovery of any tax. This would seem clear from the proviso to s. 33(1) of the Limitation Ordinance 1953. Reading s. 91 of the Income Tax Act, 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words "within twelve years after its expiration" are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment.

It was contended for the appellant that there was no allegation of wilful default in the affidavit in support of the plaintiff's application under O. 14. But the fact that additional assessments were made for the years of assessment 1953 and 1958 was sufficient to indicate such default. In any event, s. 106(3) of the Income Tax Act, 1967 provides that "in any proceedings under this section the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5)." In the circumstances the learned Judge had no power to entertain any of the pleas raised before him by the appellant in opposing the plaintiff's application for leave to sign final judgment.

With respect to Gill CJ, we find his conclusions aforesaid patently inconsistent. On the one hand, when considering the submission of Counsel for the taxpayer appellant that there had been no allegation of wilful default in the affidavit filed in support of the application under O. 14, he had rejected it, on the ground that the fact that additional assessments had been made for the previous years concerned, was sufficient to indicate such default, thereby clearly implying that the High Court **had the power** to decide on the plea of limitation based upon sub-sections 1 and 3 of s. 91 of the Act. But, on the other hand, almost in the same breath - in the same paragraph - he had relied on sub-section 3 of s. 106 of the Act, and concluded that the Judge **had no power** to entertain **any** of the pleas raised before him by the taxpayer appellant (including, of course, the plea of limitation).

a In our view, the High Court has **no power** to entertain a plea of limitation under sub-sections 1 and 3 of s. 91 of the Act advanced by a taxpayer. However, the Special Commissioners have such power. Our reasons for these conclusions now follow.

b If Counsel for the taxpayer were correct in his contention that the plea of limitation based on sub-sections 1 and 3 of s. 91 of the Act is available to him in proceedings for recovery of tax brought in Court as well as in proceedings before the Special Commissioners, then a decision by the High Court on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court thereby abdicating their fact finding function of determining whether there has been fraud or wilful default within the meaning of sub-section 3(a) of s. 91 of the Act. Alternatively, even if the Special Commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the identical question of limitation. These would not be reasonable results and, what is unreasonable, cannot be the law.

c In so holding, we do not overlook the point that further appeals lie to the High Court by way of case stated on a point of law, against the decision of the Special Commissioners pursuant to para. 34 of Schedule 5 to the Act, and thereafter, to the Federal Court. Therefore, *d* it is perfectly possible that the plea of limitation in this case may ultimately arise for determination by this Court, but this would be by way of a different route, and the powers which this Court would exercise in such a situation would not be full appellate powers. This is because the object of an appeal by way of case stated is clearly to provide a limited right of appeal from the Special Commissioners to the High Court, in cases where a point of law is involved. The High Court would then confine itself to the point of law appearing in the case stated, and having answered it, would apply it to the facts as found by the Special Commissioners, who are Judges of fact. But “in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value” (Per Lord Diplock in *Lim Foo Yong Sdn. Bhd. v. Comptroller-General of Inland Revenue* [1986] 2 MLJ 161, 169 Col 2 F).

e Thereafter, an appeal may be brought from the decision of the High Court to the Federal Court, but in exercising that jurisdiction, the Federal Court, would be subject to the same restrictions as that to which the High Court is subject. In other words, in such a situation, the Federal Court too would not be exercising full appellate powers unlike an appeal from a decision of the High Court given in the exercise of its original jurisdiction when it would be exercising full appellate powers.

f For the sake of completeness, we must add that in a situation where summary judgment has been entered against a taxpayer in proceedings by way of suit for the recovery of tax, and the taxpayer has appealed to the Special Commissioners and, if in such appeal, a plea of limitation is successfully invoked by such taxpayer, then, we are of the view that the result of such appeal before the Special Commissioners (unless reversed on further appeal), being in conflict with the order for summary judgment, must override the order for summary judgment. We say so because the Special Commissioners are the judges of fact, and have the jurisdiction to consider not only a plea of limitation based on sub-sections 1 and 3 of s. 91 of the Act but also other issues such as whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, all of which are issues which the Court in proceedings for recovery of tax by suit is prohibited by s. 106(3) of the Act from entertaining.

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Having said that we must go on to say that the Judge's order deducting the sum of RM51,244.16 claimed by way of additional assessment for the year of assessment 1971, from the total sum of RM504,052, was wrong and we therefore had no option but to set it aside. We need hardly add that the taxpayer is, of course, at liberty to pursue the limitation point in his appeal before the Special Commissioners.

As for the Judge's order for stay in regard to the balance of the sum claimed by the Revenue, we consider that the Judge had the power to grant a stay and we need no more than refer to the following passage in the judgment of Gunn Chit Tuan CJ, when speaking for the Supreme Court in *Chong Woo Kiat v. Government of Malaysia* [1989] 1 MLJ 473 (at p. 475 col. 2 last para:

... However, as it was not due to any fault on the part of the taxpayer that his appeal to the Special Commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the Special Commissioners of the taxpayer's appeal against the assessments raised against him.

We would interpolate, to add, that in another tax appeal, heard at the same sitting at which the instant appeal was heard, we had indeed upheld an order for stay made by the High Court at Tawau, Sarawak, because we were satisfied that the Judge (Mr. Justice Ian Chin) had ample material before him to justify the granting of an order for stay and there were therefore no grounds for us to interfere with the exercise of his discretion. (See *Government of Malaysia v. Jasanusa Sdn. Bhd.*, Supreme Court Civil Appeal No. 01-20-94).

However, in the instant appeal, the question arose whether having regard to the particular circumstances of the case, the Judge was entitled to exercise his power to grant a stay.

We noted, that in the instant appeal, there was no formal application for stay supported by an affidavit affirmed by the taxpayer or his duly authorised agent, alleging special circumstances to justify the making of the order for stay. In other words, although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the Judge could have granted the order for a stay. The *Jasanusa* case, cited *supra*, was therefore readily distinguishable, on the facts. We thus had no option but to discharge the order for stay.

In the result, the appeal was allowed, the judgment of the Court below set aside, and in lieu thereof, we substituted the orders aforesaid. The deposit paid into Court by way of security for the costs of the appeal was ordered to be paid out to the appellant to account of its taxed costs.